Nos. 14-46, 14-47, 14-49

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In The
Supreme Court of the United States

MICHIGAN, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

UTILITY AIR REGULATORY GROUP,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

NATIONAL MINING ASSOCIATION,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE STATE AND LOCAL GOVERNMENT RESPONDENTS

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QUESTION PRESENTED

Whether the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities.

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INTRODUCTION

In Clean Air Act Section 112(n)(1)(A), Congress directed EPA to perform a study of "the hazards to public health reasonably anticipated to occur as a result" of power-plant emissions, and to regulate those emissions if it finds it "appropriate and necessary after considering the results of the study." When EPA made its "appropriate and necessary" determination in 2000, and confirmed that determination with its 2012 promulgation of the Mercury and Air Toxics Standards (Air Toxics Rule), it did exactly that: EPA based its threshold determination to regulate hazardous air emissions from power plants primarily on the need to protect public health. EPA did not consider costs when making that threshold determination to regulate power plants under Section 112; rather, it considered costs when developing the technology-based standards for reducing power-plant hazardous air pollution pursuant to Section 112(d). The court of appeals correctly held that EPA's choice not to consider costs when first deciding whether it was "appropriate and necessary" to regulate hazardous air pollution from power plants was permissible under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Power plants are the largest source of hazardous air pollution in the Nation, 77 Fed. Reg. 9304, 9311 (Feb. 16, 2012), annually emitting hundreds of thousands of tons, in the aggregate, of mercury, chromium, arsenic, nickel, selenium, hydrogen fluoride, hydrogen cyanide, and hydrogen chloride. *See, e.g.*,

76 Fed. Reg. 24,976, 25,005-06 (May 3, 2011). By 2015, the Air Toxics Rule will reduce mercury emissions nationally by seventy-five percent, fine particulate matter emissions (to which toxic metals adhere) by nineteen percent, and acid gas emissions by eighty-eight percent. 77 Fed. Reg. at 9424. The Rule will have immense public health benefits, including both the vast monetized benefits of reduced exposure to fine particulate matter, and substantial non-monetized benefits, such as decreased neurological effects of mercury exposure, reduced adverse health effects of mercury exposure through commercial and non-freshwater fish consumption, and reduced exposure to non-mercury hazardous air pollution. *Id.* at 9306, Table 2.

Right now, many power plants are complying with state mercury emissions standards that are, in most cases, tougher than the Air Toxics Rule. That experience shows that the air pollution control technology required by the Air Toxics Rule is available and affordable, and compliance has occurred without electric system reliability problems or widespread economic harm. Sixty-four percent of the Nation's coal-fired generating capacity has in place the controls necessary to comply with the Rule – demonstrating there is no practical impediment to compliance.[1]

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[1] U.S. Energy Info. Admin., Today in Energy, *Coal-fired Power Plant Operators Consider Emissions Compliance Strategies* (March 28, 2014) (EIA Report), http://www.eia.gov/todayinenergy/detail.cfm?id=15611# (last visited Feb. 17, 2015).

But given the trans-boundary effects of air pollution, states' efforts are not enough – the serious health risks posed by power-plant hazardous air pollution cannot be addressed adequately without a federal standard.

STATEMENT OF THE CASE

Respondent States and Local Governments hereby incorporate the Statement of the Case in Respondent EPA's brief, including its discussion of the regulatory history and the decision below. Respondent States and Local Governments respectfully submit additional facts concerning the States' experience that are material to the Court's consideration of the question presented.

Effects of Power-Plant Emissions on States

By 2011, when EPA proposed the Air Toxics Rule, power plants had become "the most significant source of [hazardous air pollutants] that remain[ed] unaddressed by [Section 112]." 77 Fed. Reg. at 9335; 76 Fed. Reg. at 24,980. Congress was aware of concerns regarding power-plant emissions of hazardous air pollutants when it amended Section 112 in 1990,[2] but

[2] *See, e.g.*, S. Rep. No. 101-228, at 131, 154 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3515 ("Lakes all across the northern tier of states are now posted with warnings for pregnant women and children because of high mercury levels in fish attributable

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delayed Section 112 regulation pending evidence of possible hazardous air pollutant reductions resulting from power plants' compliance with the then-new Title IV Acid Rain Program. Thus, Congress required EPA to study the "hazards to public health" resulting from power-plant hazardous air pollutant emissions "after imposition" of other Clean Air Act requirements ("Public Health Study"). 42 U.S.C. § 7412 (n)(1)(A). *See infra* pp. 21-23. In 2000, EPA, based on the results of that Study, made its threshold "appropriate and necessary" determination that power-plant hazardous air pollution posed a threat to public health and should be regulated under Section 112. 65 Fed. Reg. 79,825, 79,831 (Dec. 20, 2000).

In the decades since the 1990 Amendments, power plants have continued to emit hazardous air pollution, and their proportional share of U.S. emissions has grown. During this time, EPA issued rules requiring controls on over 170 different source categories resulting in an overall sixty-percent reduction in domestic hazardous air pollutant emissions. 77 Fed. Reg. at 9335; 76 Fed. Reg. at 24,980. Even small sources of hazardous air pollutants, such as dry cleaners and auto shops, substantially reduced their

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to mercury emissions from coal-fired power plants."); 136 Cong. Rec. 36,062 (1990) (statement of Sen. David Durenberger) (Power plants "are a significant part of the air toxics problem" and "emit mercury, radionuclides and arsenic in significant amounts.").

emissions. 76 Fed. Reg. at 24,980. Meanwhile, power plants' proportional share grew; their contribution to domestic mercury emissions, for example, doubled from less than twenty-five percent in 1990 to fifty percent in 2005. 76 Fed. Reg. at 24,980; Memorandum from Marc Houyoux and Madeleine Strum, Emission Inventory and Analysis Group, Emissions Overview: Hazardous Air Pollutants in Support of the Final Mercury and Air Toxics Standard (Dec. 1, 2011), J.A. 827, n.17.[3]

EPA estimates that since 2000, when it initially determined that it was "appropriate and necessary" to regulate power-plant emissions, until 2011, when it confirmed that determination and proposed emission standards, power plants released hundreds of tons of mercury. 76 Fed. Reg. at 25,016; *see also id.* at 24,980, 25,016. Moreover, in 2005 alone, power plants released 120 tons of chromium, 200 tons of arsenic, 320 tons of nickel, 580 tons of selenium, 7900 tons of hydrogen cyanide, 47,000 tons of hydrogen fluoride, and

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[3] EPA has regulated every other major source of mercury under Section 112. *See, e.g.*, 75 Fed. Reg. 15,608 (Mar. 21, 2011) (industrial, commercial, institutional boilers, and process heaters); 76 Fed. Reg. 9450 (Feb. 17, 2011) (gold mine ore processing and production); 73 Fed. Reg. 226 (Jan. 2, 2008) (iron and steel foundries); 72 Fed. Reg. 74,088 (Dec. 28, 2007) (electric arc furnace steelmaking facilities); 71 Fed. Reg. 76,518 (Dec. 20, 2006) (Portland cement manufacturing); 70 Fed. Reg. 59,402 (Oct. 12, 2005) (hazardous waste combustors); 68 Fed. Reg. 70,904 (Dec. 19, 2003) (mercury cell chlor-alkali plants).

350,000 tons of hydrogen chloride. 76 Fed. Reg. at 25,005-06.

Hazardous air pollutants, like mercury, are toxic in tiny amounts; EPA's reference dose for methylmercury[4] – the estimate of the daily exposure that is "likely to be without an appreciable risk of deleterious effects during a lifetime" – is only 0.1 micrograms per kilogram per day. 77 Fed. Reg. at 9351-52; *see also* 65 Fed. Reg. at 79,829. The primary route of methylmercury exposure for people is eating mercury-contaminated fish. 76 Fed. Reg. at 25,000.

When EPA issued its 2000 "appropriate and necessary" determination, it found that seven percent of U.S. women of childbearing age were exposed to mercury levels exceeding the reference dose. 65 Fed. Reg. at 79,829-30. Annually, several hundred thousand children born in the United States have been exposed in utero to unsafe mercury levels. Comments of the Envtl. Defense Fund, J.A. 384; Comments of Envtl. & Pub. Health Grps. (Pub. Health Grps. Cmts.), J.A. 342. The serious harms caused by prenatal exposure to low levels of mercury – including impaired attention, fine motor function, language skills, visual-spatial abilities, and verbal memory – limit children's ability to learn and achieve. 76 Fed.

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[4] Methylmercury, which is formed by microbial action in sediment and soils when mercury precipitates from air and deposits into waterbodies and land, is taken up by aquatic organisms and bioaccumulates in the food chain, concentrating in the tissues of fish and other organisms. 76 Fed. Reg. at 25,000.

Reg. at 25,018; *see also* 65 Fed. Reg. at 79,829. These harms impose life-long costs that EPA was not able to quantify in evaluating the public health risks of power-plant methylmercury exposure or as part of its separate Regulatory Impact Analysis (RIA), completed pursuant to Executive Order Nos. 12,866 and 13,563. *See* 77 Fed. Reg. at 9353 (explaining that because IQ is "not the most sensitive neurodevelopmental endpoint affected by [methylmercury] exposure" reliance on it "underestimates the impact of reducing methylmercury in water bodies"); RIA 4-65, J.A. 941.

Other toxic pollutants emitted by power plants similarly pose more substantial risks to children. Mutagenic carcinogens, such as hexavalent chromium, pose greater risk due to children's rapid development. 76 Fed. Reg. at 25,018. Children, who have higher respiratory rates than adults, also tend to inhale relatively larger quantities of pollutants, including acid gases and fine particulate matter. *Id.*; *see also* Pub. Health Grps. Cmts., J.A. 351. The presence in fine particulate matter of toxic metals that are emitted in large quantities by power plants – chromium, arsenic, selenium, and nickel – has been linked to increased severity of the adverse health effects associated with that pollution. Pub. Health Grps. Cmts., J.A. 343-44.

The near-ubiquitous mercury contamination of our Nation's waters poses a significant threat to public health. To warn citizens, all fifty states – up from forty states in 2000 – have put fish consumption

advisories into effect.[5] EPA's 2011 national-scale risk assessment completed in support of the Air Toxics Rule showed that by 2016, power-plant emissions *alone* would cause exceedances of safe mercury levels in ten percent of 3100 watersheds modeled, and would significantly contribute to exceedances of safe mercury levels in twenty-nine percent of those watersheds. 77 Fed. Reg. at 9311, 9339, 9362, 9366.[6] In some states, all, or nearly all, waters are unsafe for fish consumption due to mercury contamination.[7] That contamination is significant enough to require the development of state-wide mercury "pollution budgets," known as "total maximum daily loads"

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[5] *See* 65 Fed. Reg. at 79,827; U.S. EPA, EPA-820-F-13-058, *2011 National Listing of Fish Advisories* (2013), http://water.epa.gov/scitech/swguidance/fishshellfish/fishadvisories/loader.cfm?csModule=security/getfile&PageID=685927 at 4.

[6] EPA did not consider estuarine waters, such as the Chesapeake Bay, or commercial fisheries, such as the Great Lakes, which both receive significant power-plant mercury deposition, and thus likely understated the problem. 77 Fed. Reg. at 9347; 76 Fed. Reg. at 25,007, 25,016; *see also* 77 Fed. Reg. at 9362 (noting that several watersheds with the highest power-plant mercury deposition were excluded).

[7] *See, e.g.*, North Carolina Mercury Total Maximum Daily Load (2012) (North Carolina TMDL), http://portal.ncdenr.org/c/document_library/get_file?uuid=aecb3619-c246-4b49-bfd8-fd5541775110&groupId=38364 at 20 (all state waters impaired for fish consumption due to mercury contamination); Statewide Michigan Mercury Total Maximum Daily Load: Public Review Draft (2013) (Michigan Draft TMDL), http://www.michigan.gov/documents/deq/wrd-swas-hgtmdl-draft_415360_7.pdf at 9 (all inland lakes and several hundred river miles subject to mercury-related fish consumption advisories).

(TMDLs), for mercury-polluted waterbodies in eight Northeastern states and four states in the Southeast and Midwest to meet federal Clean Water Act water quality standards. *See* 33 U.S.C. § 1313(d)(1) (requiring development of TMDLs for impaired waters).[8]

States' Efforts

Faced with ongoing delays in the promulgation of Section 112 emission standards for power plants, many of the undersigned states implemented comprehensive controls on power plants within their own borders.[9] Between 2000 and 2010, at least fifteen

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[8] Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont are implementing a regional mercury TMDL, while Florida, Michigan, Minnesota, New Jersey, and North Carolina are implementing or finalizing statewide mercury TMDLs. *See* Northeast Regional Mercury Total Maximum Daily Load, at vi, 44 (2007) (Northeast TMDL), http://www.epa.gov/region1/eco/tmdl/pdfs/ne/Northeast-Regional-Mercury-TMDL.pdf; Final Report: Mercury TMDL for the State of Florida (2013) (Florida TMDL), http://www.dep.state.fl.us/water/tmdl/docs/tmdls/mercury/Mercury-TMDL.pdf; Michigan TMDL, *supra* note 7; Minnesota Statewide Mercury Total Maximum Daily Load (2007) (Minnesota TMDL), http://www.pca.state.mn.us/index.php/view-document.html?gid=8507; Total Maximum Daily Load for Mercury Impairments Based on Concentration in Fish Tissue Caused Mainly by Air Deposition (2009) (New Jersey TMDL), http://www.nj.gov/dep/wms/bear/TMDL%20HG%20document%20final%20version%209-8-09_formated%20for%20web%20posting%20js.pdf; North Carolina Mercury TMDL, *supra* note 7.

[9] Numerous states have also stringently controlled other sources of mercury emissions, including municipal waste and medical waste incinerators, and have regulated mercury contained in automotive light switches, thermostats, thermometers, and

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states[10] enacted regulations requiring coal-fired power plants within their borders to reduce mercury emissions. Comments of the Nat'l Ass'n of Clean Air Agencies (NACAA Cmts.), J.A. 306-20. Other states without such regulations have required power plants to install mercury-monitoring equipment or evaluate the feasibility of mercury controls. *Id.*[11] Nearly every state with power-plant mercury emission standards has required more health protective limits than the Air Toxics Rule. *See infra* pp. 36-37. Those standards – which have been implemented without adverse electricity reliability impacts[12] – have reduced mercury

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dental products. Comments of the New England Interstate Water Pollution Control Comm'n (NEIWPCC Cmts.), J.A. 230; Comments of the Northeast States for Coordinated Air Use Management (NESCAUM Cmts.), J.A. 237.

[10] These states are Colorado, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, North Carolina, New York, Oregon, and Wisconsin. *See infra* note 18. Currently, Maine, Rhode Island, Vermont, and the District of Columbia contain no coal-fired power plants subject to the Air Toxics Rule.

[11] Beginning in 2008, South Carolina required power plants to install mercury emission monitoring equipment. NACAA Cmts., J.A. 311-12. Georgia has required certain power plants to complete mercury control feasibility studies by 2018. GA. COMP. R. & REGS. 391-3-1-.02(sss)(16)(v).

[12] *See* Comments of the Massachusetts Dep't of Envtl. Prot. (Massachusetts Cmts.), J.A. 225 ("Massachusetts facilities have . . . install[ed] control equipment with no impact on reliability of the electric power grid and have demonstrated consistent compliance with the [state's mercury] limits" which are "considerably more stringent than those proposed by EPA."); NACAA Cmts., J.A. 296 ("Years, and in some cases decades, of experience

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emissions in the Northeast dramatically and have achieved measurable reductions in mercury levels in fish and other biota. Massachusetts Cmts., J.A. 216, 226; NACAA Cmts., J.A. 290; NESCAUM Cmts., J.A. 237.

Such state requirements, however, have not solved – and cannot solve – the problem of interstate hazardous air pollution. Mercury can travel hundreds of miles from the smokestack. *See* 77 Fed. Reg. at 9444. A significant portion of Northeast mercury deposition originates from uncontrolled power plants located in other states. Massachusetts Cmts., J.A. 222; NEIWPCC Cmts., J.A. 229; NESCAUM Cmts., J.A. 238-39. Until those out-of-state power-plant emissions are addressed, Northeastern waters will not meet federal water quality standards. *See* Northeast TMDL, *supra* note 8, at 44 (concluding that EPA action to "implement significant reductions from upwind out-of-region sources, primarily coal-fired power plants" is necessary to return fish methylmercury concentrations to safe levels); Massachusetts Cmts., J.A. 223; NEIWPCC Cmts., J.A. 229-30; Comments of the New York State Dep't of Envtl. Conservation

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demonstrates that [the technologies available to reduce power plant hazardous air pollutant emissions] can reliably deliver the expected performance at reasonable cost."); NACAA Cmts., J.A. 297 (State implementation of recent federal air pollution rules requiring the same controls as the Air Toxics Rule shows that the controls can be installed in the Section 112 timeframe "without disrupting supplies of electricity.").

(New York Cmts.), J.A. 798; NESCAUM Cmts., J.A. 238-39.

Achievement of other states' TMDL goals will also require federal regulation of power plants. Thirty percent of Minnesota's mercury deposition, for example, originates from out-of-state domestic sources. Minnesota TMDL, *supra* note 8, at 20-21, 45 (stating that federal regulation of those sources, such as power plants, holds most promise for reaching its TMDL goals); *see also* New Jersey TMDL, *supra* note 8, at 31 (noting that twenty-six percent of New Jersey's air deposition mercury load originates from five surrounding states); North Carolina TMDL, *supra* note 7, at 6 (noting that fifteen percent of North Carolina's total mercury deposition originates from out-of-state regional sources). Similarly, South Carolina's initiative to reduce mercury pollution "relies in part on the EPA to meet its [Clean Air Act] obligations to promulgate lawful standards to address mercury." Comments of the South Carolina Dep't of Health and Envtl. Control, J.A. 196.

Without a federal standard, citizens of the Respondent States and Local Governments are unable to receive the necessary public health protections from in-state mercury reductions due to cross-border movement of mercury emissions from out-of-state power plants. The Air Toxics Rule imposes national controls that are essential to both protecting public

health and the environment and leveling the regulatory playing field across the country.

SUMMARY OF ARGUMENT

Section 112(n)(1)(A) did not require EPA to consider costs when it made its threshold determination to regulate power-plant hazardous air pollution. Instead, the language of Section 112(n)(1)(A), its statutory context and legislative history, and the purpose of the Act demonstrate that Congress intended EPA to regulate power-plant hazardous pollution if EPA found, as it did, that it was "appropriate and necessary" to do so based on the Public Health Study and considering the effect of other Clean Air Act provisions on controlling that pollution.

Nothing in Section 112(n)(1)(A) provides any basis to treat that provision like "residual risk" provisions contained elsewhere in Section 112. Because Section 112 standards have never been applied to power plants, there is no "residual risk" remaining from the imposition of any such standards. Further, Congress did not require costs to be considered for purposes of setting Section 112 "residual risk" standards, so even if Section 112(n)(1)(A) is a "residual risk" standard, that conclusion would not compel consideration of costs.

Congress did not exclude costs from consideration in Section 112. Rather, it provided in the statute that costs should be considered at the standard-setting

stage, not for purposes of EPA's initial decision whether to regulate power-plant hazardous air pollution at all. That approach is similar to the manner in which Congress directed EPA to consider costs when regulating mobile and stationary source emissions. Here, EPA properly considered costs when establishing technology-based standards pursuant to Section 112(d), not when making the threshold decision whether to regulate.

This Court's precedent recognizes no rule requiring EPA to consider costs when Section 112(n)(1)(A) does not require EPA to do so. Rather, it establishes that, when faced with statutory ambiguity, agencies, not courts, should resolve any struggle between competing views of the public interest.

Several states have implemented state power-plant mercury standards more stringent than those required by the Air Toxics Rule, as well as other federal air pollution rules requiring technological controls similar to those imposed by the Rule. Power plants have demonstrated successfully their ability to comply with those standards. That experience shows that the Rule's requirements are achievable; cost-effective control technologies are available; and compliance with such standards causes no adverse effects on electric system reliability.

Finally, the extensive analysis of benefits and costs set forth in EPA's RIA provides ample evidence that, even if costs were considered, EPA's decision to regulate power-plant hazardous air pollution would

be appropriate, since the Rule's benefits, taken together, far outweigh its costs.

ARGUMENT

I. EPA Permissibly Declined to Consider Costs in Making Its Threshold Determination to Regulate Power Plants Under Section 112 and Properly Considered Costs at the Standard-Setting Stage.

The only question presented here is whether, applying *Chevron*, EPA's interpretation – that Section 112(n)(1)(A) does not require it to consider costs when deciding whether to regulate power-plant hazardous air pollutants – is permissible. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (EPA's interpretation will govern "if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts.") (emphasis in original); *see also EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603, 1607 (2014) (affording *Chevron* deference to EPA's "reasonable interpretation of ambiguous statutory language"). Petitioners cannot demonstrate an unambiguous requirement in Section 112(n)(1)(A) for EPA to consider costs at the listing stage, and thus EPA's reasonable interpretation must prevail. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 465-69 (2001).

A. Section 112(n)(1)(A) Does Not Require Costs to be Considered at the Threshold Listing Stage.

By closely analyzing the statutory text and the context in which the 1990 Amendments were enacted, the court of appeals properly followed this Court's teaching that interpretation of statutory terms is context-dependent. *See Entergy Corp.*, 556 U.S. at 222 (explaining that, taken in context, statutory silence was "meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree"); *Whitman*, 531 U.S. at 471. Accordingly, "[l]acking a dispositive statutory instruction to guide it," EPA's decision here was "a 'reasonable' way of filling the 'gap left open by Congress.'" *EME Homer City*, 134 S. Ct. at 1607 (quoting *Chevron*, 467 U.S. at 866).

The decision below affirming EPA's reasonable interpretation does not preclude EPA from considering costs in any other Clean Air Act rulemaking, nor does it create any new rule – bright line or otherwise – regarding when costs may be considered by EPA. Under this Court's precedent, such questions properly turn on interpretations of specific statutory language, statutory context, and, where appropriate, legislative history and other record facts that illuminate congressional intent.

In *Whitman*, this Court sustained EPA's decision not to consider implementation costs when setting

National Ambient Air Quality Standards (NAAQS) for the protection of public health and welfare under Section 109 of the Act. 531 U.S. at 464-71. The Court, rejecting the industry respondents' interpretation of Section 109 as allowing for cost consideration, cited numerous provisions where, in contrast to Section 109, Congress expressly authorized cost consideration. *Id.* at 467. Finding no clear "textual commitment of authority to the EPA to consider costs," *id.* at 468, the Court held that the text "interpreted in its statutory and historical context and with appreciation for its importance to the [Clean Air Act] as a whole, unambiguously bars cost considerations from the NAAQS-setting process," *id.* at 471.

Here, as in *Whitman*, no evidence exists in the text of Section 112(n)(1)(A) "interpreted in its statutory and historical context" or in the Clean Air Act's structure "as a whole" that Congress required that costs be considered at the listing stage. *Id.* at 471.

First, Section 112(n)(1)(A)'s plain language shows that Congress intended EPA's consideration of "hazards to public health" in the Public Health Study to be the touchstone informing EPA's determination whether it was "appropriate and necessary" to regulate power-plant hazardous air pollution. In the 1990 Amendments, Congress mandated that:

> [the] Administrator shall perform *a study of the hazards to public health reasonably anticipated to occur as a result of emissions by* [*power plants*] *of pollutants listed under subsection (b)* of this section after the imposition

> of the requirements of this chapter. . The Administrator shall regulate [power plants] under this section, if the Administrator finds *such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.*

42 U.S.C. § 7412(n)(1)(A) (emphases added).

Section 112(n)(1)(A) nowhere mentions costs; it neither requires EPA to consider costs, nor prohibits EPA from doing so. Instead, the statute focuses on the public health harms expected from power-plant hazardous air pollution. Section 112(n)(1)(A) required EPA to study the "hazards to public health" resulting from power-plant emissions "after imposition of the requirements of this chapter," (such as the newly created Acid Rain Program, *see infra* pp. 21-23),[13] and mandated that EPA "shall" regulate that pollution if EPA found it "appropriate and necessary" to do so after considering the study's results. *Id.* § 7412(n)(1)(A).[14]

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[13] Section 112(n)(1)(A) also required EPA, in its report to Congress on the results of the Public Health Study, to "describe . . . alternative control strategies for emissions" warranting regulation under Section 112(n)(1)(A). 42 U.S.C. § 7412(n)(1)(A). Congress did not require EPA to consider the costs of such technologies. *Id.*

[14] Petitioner Michigan incorrectly argues that EPA's interpretation renders the term "appropriate" superfluous. Michigan Br. 23. EPA found it "appropriate" to regulate because mercury is a hazard to public health; power plants are the largest source of domestic mercury emissions; and it had "identified certain

(Continued on following page)

Second, when Section 112(n)(1)(A) is read within the context of Section 112 as a whole, EPA's focus on public health protection as the trigger for listing power plants is consistent with Congress's overall approach to regulating hazardous air pollutants. For example, when it revamped Section 112 in 1990, Congress specifically listed multiple hazardous air pollutants – without consideration of cost. *See id.* § 7412(b)(1). Further, Congress mandated that when listing additional hazardous air pollutants for regulation, EPA's sole focus must be reducing threats to public health and the environment. *See id.* § 7412(b)(2) (EPA "shall add[ ] pollutants which present, or may present, a threat of adverse human health effects or adverse environmental effects."). Congress also declined to require that costs be considered for purposes of listing source categories. *See id.* § 7412(a)(1)-(2), (c)(1).

Moreover, the process Congress put in place for removing a hazardous pollutant source category is also cost-blind. *See id.* § 7412(c)(9). Costs play no role in a delisting determination; the sole focus

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control options that would effectively reduce [hazardous air pollutant] emissions from U.S. [power plants]," 77 Fed. Reg. at 9310. EPA found it "necessary" to regulate because implementation of the Act's requirements, other than Section 112, will not "adequately address the serious public health and environmental hazards arising from [hazardous air pollutant] emissions from U.S. [power plants]" and Section 112 is "intended to address [hazardous air pollutant] emissions." *Id.*; *see also id.* at 9363.

is public health and environmental effects. *See id.* § 7412(c)(9)(B)(i)-(ii). It would be incongruous to require EPA to consider costs when making the initial decision whether to regulate power plants as a source category when Congress plainly saw no role for EPA to consider costs when delisting any source category, including power plants.

Third, Congress mentioned costs expressly where it intended EPA to consider them. *See id.* § 7412(d)(2), (d)(8)(A)(i), (d)(8)(B)(i), (f)(1)(B), (f)(2)(A), (n)(1)(B), (s)(2). In fact, Section 112(n)(1)(A), which is silent on costs, is immediately followed by Section 112(n)(1)(B), which expressly requires EPA to conduct a study (for submission to Congress) of mercury emissions from power plants and other sources, and to consider, among other factors, the costs of available control technologies. *Id.* § 7412(n)(1)(B). It is generally presumed that Congress acts intentionally when it includes specific language in one statutory section, but not in another. *Loughrin v. U.S.*, 134 S. Ct. 2384, 2390 (2014) ("[W]hen 'Congress includes particular language in one section of a statute but omits it in another' – let alone in the very next provision – this Court 'presume[s]' that Congress intended a difference in meaning." (alteration in original) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Gen. Motors Corp. v. U.S.*, 496 U.S. 530, 537-38 (1990) (Where Congress omitted a deadline for EPA action in Section 110(a)(3)(A) of the Clean Air Act, but expressly included such deadlines elsewhere, including in "the very next provision," Congress likely acted

intentionally.); *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 257 n.5 (1976) ("Where Congress intended the Administrator to be concerned about economic and technological infeasibility [in the 1970 Amendments to the Clean Air Act], it expressly so provided.").

Fourth, Section 112(n)(1)(A)'s legislative history confirms that EPA's decision not to consider costs at the threshold listing stage is permissible. In the 1970 Clean Air Act Amendments, Congress directed EPA to identify and list air pollutants that "cause or contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness," and put in place emissions standards that would "provide[ ] an ample margin of safety to protect the public health." Pub. L. No. 91-604, § 112(a)(1), (b)(1)(B), 84 Stat. 1676, 1685 (1970). That risk-based approach proved unwieldy; in 1989, Congress acknowledged that the law had "worked poorly," and that "[i]n 18 years, EPA has regulated only some sources of only seven chemicals." S. Rep. No. 101-228, at 128, 1990 U.S.C.C.A.N. at 3513 (internal quotations omitted). EPA's failure to regulate hazardous air pollutants reflected, in Congress's view, a "history of abuse and abdication." *Id.* at 176, 1990 U.S.C.C.A.N. at 3561.

Congress was therefore focused in 1990 on ensuring prompt, effective regulation of hazardous air pollution to protect public health; it wanted to fix the Act so that it would work – and work quickly – to reduce the serious threat of hazardous air pollution.

The 1990 Amendments were thus intended to remedy "the slow pace of EPA's regulation of [hazardous air pollutants]." *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008); *see also* 77 Fed. Reg. at 9327.

Consequently, Congress directly listed 189 hazardous air pollutants, 42 U.S.C. § 7412(b)(1), gave EPA one year to list all source categories that emitted the listed pollutants, *id.* § 7412(c)(1), and directed EPA promptly to establish emissions standards for those categories, *id.* § 7412(e). Congress dispensed with the risk-based approach to establishing emissions standards, instead requiring the technology-based "Maximum Achievable Control Technology" (MACT) standard, mandating that EPA consider public health risks that may remain even after applying MACT standards, and directing EPA to establish more stringent standards as required to protect public health. *Id.* § 7412(d)(2)-(3), (f)(1)-(2).

With the 1990 Amendments, Congress also created the Title IV Acid Rain Program, establishing a cap-and-trade program for power-plant emissions of sulfur dioxide and nitrogen oxides. Pub. L. No. 101-549, 104 Stat. 2399 (1990). Mindful that power plants' hazardous air pollution could be reduced if plants installed pollution controls to comply with the new Title IV program, *see, e.g.*, 136 Cong. Rec. 35,075 (statement of Rep. Michael Oxley); *id.* 36,062 (statement of Sen. David Durenberger), Congress gave power plants a "three-year pass," NMA Pet. App. 26a. Instead of requiring immediate regulation, Congress mandated that EPA first perform the Public Health

Study to identify threats to public health from power-plant hazardous air pollution remaining after the Acid Rain Program's implementation. *See* 42 U.S.C. § 7412(n)(1)(A).

The additional time afforded to complete the Public Health Study, and the requirement that the decision to regulate be based on the results of that Study, reflected a compromise: Congress wanted to understand what effect, if any, the Acid Rain Program would have on emissions of hazardous air pollutants from power plants. 76 Fed. Reg. at 24,978. Congress's measured approach reflects its intent that EPA would determine, based on public health science, whether power-plant hazardous air pollution remained a serious public health problem after implementing the Acid Rain Program, and, if so, that EPA would address that problem through the technology-based regulations of Section 112. *See* 136 Cong. Rec. 35,075 (statement of Rep. Michael Oxley) (noting that EPA may regulate power plants "after taking into account compliance with all provisions of the act").

Fifth, EPA's interpretation of Section 112(n)(1)(A) is consistent with the purpose of the Clean Air Act as a whole. When Congress first passed the Act, it found that growth in air pollution had "resulted in mounting dangers to the public health and welfare," 42 U.S.C. § 7401(a)(2), and declared that the purposes of Title I are to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," *id.* § 7401(b)(1). EPA's

interpretation that it was not required by Section 112(n)(1)(A) to consider costs in determining the threshold question whether to regulate power-plant hazardous air pollution furthers this intent. *See, e.g.*, *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1571 (D.C. Cir. 1984) (noting that Section 101(b)(1)'s protective goal is the Act's "unequivocal directive").

Section 112(n)(1)(A)'s text, statutory context, and legislative history, understood in light of the Act's overall health-protective purpose, confirm the reasonableness of EPA's interpretation of that section – focusing on public health impacts, not costs, at the threshold point of determining whether to regulate.

B. There Is No Basis for Importing a "Residual Risk" Standard Into Section 112(n)(1)(A).

Petitioner Utility Air Regulatory Group (UARG) incorrectly urges this Court to import into Section 112(n)(1)(A) a "residual risk" standard, like that in Sections 112(f)(2)(A) and 112(m)(6), which it wrongly argues would compel consideration of costs here. UARG Br. 30-31. UARG's analogy fails, however, because the residual risk provisions it cites, Sections 112(f)(2)(A) and 112(m)(6), were established to address pollution remaining *after* Section 112 technology-based standards for *hazardous air pollutants* were in place. Section 112(f)(2)(A) mandates further regulation to address any public health risks remaining

"after promulgation of standards . pursuant to subsection (d) *of this section.*" 42 U.S.C. § 7412(f)(2)(A) (emphasis added). Likewise, Section 112(m)(6) requires further regulation if "*the other provisions of this section*" are not "adequate to prevent serious adverse effects to public health and serious or widespread environmental effects" of atmospheric deposition of hazardous pollutants on, among other waterbodies, the Great Lakes and coastal waters. *Id.* § 7412(m)(6) (emphasis added). There can be no residual risk remaining from application of Section 112 hazardous air pollution standards to power plants, however, because no such standards have ever been in place.

Even if they were appropriate analogues, neither Section 112(f)(2)(A) nor Section 112(m)(6) *requires* that EPA consider the costs of any additional regulation required to address public health risk remaining after Section 112 standards are in place, nor do they evince any congressional intent that costs should trump public health. Section 112(m)(6) illustrates Congress's deep concern with public health harms and environmental degradation associated with hazardous air pollution deposition to great waters, and it provides that EPA shall regulate as "necessary and appropriate," with no mention of costs at all. Section 112(f)(1)-(2) similarly underscores Congress's singular focus on mitigating public health risk to the greatest extent possible and requires EPA to promulgate standards if required "to provide an ample margin of safety to protect public health in accordance

with this section (as in effect before November 15, 1990)." 42 U.S.C. § 7412(f)(2)(A).

As UARG has acknowledged, UARG Br. 30, Section 112(f)(2)(A) requires application of the pre-November 15, 1990 "ample margin of safety" standard. That standard, at issue in *Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (en banc), does not, however, require consideration of costs. There, the court reviewed EPA's application of the "ample margin of safety" standard to regulate hazardous vinyl chloride emissions, to determine whether EPA properly had considered "cost and technological feasibility." 824 F.2d at 1154-55. Discerning no "clear congressional intent" to preclude such considerations, the court held that EPA "may" consider those factors, and relying on *Chevron*, examined whether EPA's choice of *how* to incorporate those considerations was permissible. *Id.* at 1163. Analyzing the language and legislative history of Section 112, the court concluded "it seems to us beyond dispute that Congress was primarily concerned with health in promulgating section 112," and when setting an emission standard, "[e]very action" by EPA "is to be taken 'to protect the public health.'" *Id.* The court held that EPA was barred from considering costs at the threshold stage of deciding what constitutes a "safe" level of emissions. *Id.* at 1165 ("[EPA] cannot under any circumstances consider cost and technological feasibility at this stage of the analysis."). Costs may, but are not required, to be considered only at the second stage of deciding whether to

establish even more stringent standards to provide an "ample margin of safety." *Id.* at 1165-66. Moreover, the court recognized that EPA could apply other methodologies for determining "ample margin of safety" wherein cost could not be considered. *Id.* at 1165 n.11. The court rejected EPA's interpretation, which would have permitted the standard to be set at a less protective level if costs would be disproportionate to benefits. *Id.* at 1164.

UARG's reliance on another D.C. Circuit case addressing that same Section 112(f) "ample margin of safety" standard, *Natural Resources Defense Council v. EPA*, 529 F.3d 1077 (D.C. Cir. 2008), is misguided. Relying on *Chevron*, the court held only that it had been a permissible choice for EPA to consider costs at the second stage of determining what "margin of safety" is "ample," concluding that "EPA's interpretation of subsection 112(f)(2), although not an inevitable one, certainly is, at least, a reasonable construction of the statute." *Id.* at 1083.

The principle animating the court's holdings in these cases applies here: when Congress makes public health the touchstone for a key regulatory decision point, with no mention of cost – such as, what level of exposure to vinyl chloride is safe or whether public health hazards of power-plant pollution warrant regulation – it is, at the very least, permissible for EPA not to consider costs.

C. EPA Properly Considered Costs at the Technology-Based Standard-Setting Stage, as Congress Intended.

Congress did not exclude costs from consideration in Section 112; rather, it provided that costs to industry should be considered when setting technology standards, not at the point of EPA's initial decision whether to regulate power plants. Petitioners' contention that Congress did not intend for EPA to regulate power plants under Section 112 without considering costs rests on a "false premise," as the court of appeals explained, since Congress carefully provided for considering costs at the standard-setting stage: "[h]ere, as in *Whitman*, interpreting one isolated provision not to require cost consideration does not indicate that Congress was unconcerned with costs altogether, because Congress accounted for costs elsewhere in the statute." NMA Pet. App. 27a.

Congress requires the "maximum degree" of hazardous air pollutant emissions reduction from existing sources, 42 U.S.C. § 7412(d)(2), a level that may be no less stringent than "the average emission limitation achieved by the best performing 12 percent of the existing sources," *id.* § 7412(d)(3)(A). While cost consideration does not factor into establishing that MACT floor, the court of appeals correctly observed that "even for MACT floors, costs are reflected to some extent because floors correspond (by definition) to standards that better-performing [power plants] have *already achieved*, presumably in a cost efficient manner." NMA Pet. App. 27a (emphasis in original);

see also S. Rep. 101-228, at 168-69, 1990 U.S.C.C.A.N. at 3553-54 (evidencing Congress's understanding that selecting emissions limitations on the basis of what has been "achieved in practice by sources of a similar type or character" reflects "cost considerations"). To achieve the maximum degree of emissions reduction, EPA may require standards more stringent than MACT, and for those, it must "take[ ] into consideration the cost of achieving such emission reduction," and other factors. *Id.* § 7412(d)(2).

EPA must, and did, consider costs when setting such standards here. *See, e.g.*, 76 Fed. Reg. at 25,046 (rejecting duplicate controls, such as multiple scrubbers, because cost was unreasonable); *id.* (rejecting coal-to-gas retrofit because it is "not cost-effective"); 77 Fed. Reg. at 9393 (discussing costs of standard for power plants burning low-rank virgin coal); 77 Fed. Reg. at 9411-13 (discussing cost of sorbent injection technology and noting that "[s]enior technical staff from the EPA have carefully evaluated the key assumptions regarding the cost and operation of emission control technologies").[15]

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[15] EPA also discussed other associated costs in the proposed and final versions of the Air Toxics Rule. *See, e.g.*, 76 Fed. Reg. at 25,051-52 (compliance and monitoring costs); 76 Fed. Reg. at 25,053 (proposing emissions averaging for certain existing sources because less costly); 76 Fed. Reg. at 25,075-78 (costs and benefits, costs by control measure); 77 Fed. Reg. at 9413 (electricity price impacts, job market effects, and other economic impacts); 77 Fed. Reg. at 9416 (impacts on low income consumers); 77 Fed. Reg. at 9425-31 (cost, economic impacts, and benefits).

Section 112's framework – requiring costs to be considered at the standard-setting stage, but not at the point of making an initial decision whether to regulate at all – is similar to Congress's approach in other key Clean Air Act programs. Under the New Source Performance Standards program, Congress required EPA to list categories of stationary sources that "cause[] or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). EPA's stationary source category listing decision turns solely on EPA's consideration of public health impacts – costs are not a factor. However, when EPA sets performance standards under Section 111, Congress made specific provision for the agency to consider costs. *See id.* § 7411(a)(1).

When EPA regulates mobile sources, Congress mandated that EPA "shall" prescribe emissions standards for any air pollutants that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Congress also provided that any regulation must take effect after a period EPA deems necessary to permit technology development "giving appropriate consideration to the cost of compliance within such period." 42 U.S.C. § 7521(a)(2).

As with Section 112, Congress directed EPA to base its initial decisions to regulate both motor-vehicle and stationary-source emissions on public health, without regard to cost, notwithstanding that Congress recognized those regulations would result

in costs to large industrial sectors. *See Whitman*, 531 U.S. at 491-92 (Breyer, J., concurring) ("[T]he 1970 Amendments were 'expressly designed to force regulated sources to develop pollution control devices that *might at the time appear to be economically or technologically infeasible*.'" (emphasis in original) (quoting *Union Elec.*, 427 U.S. at 257)).

The Act's pattern is clear: Congress intended for EPA, relying on its expertise, and in the case of Section 112(n)(1)(A), on the results of the Public Health Study as well, to focus on public health, not costs, when making the threshold decision to regulate. Congress did not want EPA to disregard costs; rather, it required costs to be taken into account when EPA crafts compliance measures, including setting the performance standards required by Sections 111 and 112. *See, e.g.*, *Whitman*, 531 U.S. at 493 (Breyer, J., concurring) ("[T]he Act does not . wholly ignore cost and feasibility" but instead "allows regulators to take those concerns into account when they determine *how* to implement ambient air quality standards. " (emphasis added) (internal citations omitted)).

Petitioner Michigan asserts that Section 112(n)(1)(A) "direct[ed] EPA to look ahead to the costs that would be imposed at the implementation stage." Michigan Br. 43. There is no hint in the text of Section 112(n)(1)(A) that Congress intended that for power plants – unlike any other source – the "threshold question *whether* to regulate" would be collapsed with the inquiry about "*how* regulation will be implemented." *Id.* (emphasis in original). Section 112(n)(1)

governs only "how the Administrator decides whether to list [power plants]." *New Jersey*, 517 F.3d at 582. Petitioner Michigan's reliance on *Natural Resources Defense Council*, 824 F.2d at 1163, is also misplaced, Michigan Br. 27-29, since that case provides further support for EPA's reading here. *See supra* pp. 26-27.

EPA's decisions to consider costs in deciding the extent of required pollution reductions from upwind states under the Clean Air Act, as in *EME Homer City*, 134 S. Ct. at 1603-04, or in setting national performance standards for cooling water intake structures at power plants under the Clean Water Act, as in *Entergy Corp.*, 556 U.S. at 217-18, are materially different from EPA's decision at issue here – *whether* to regulate hazardous air pollutants from power plants *at all*. EPA reasonably exercised its discretion and addressed costs where expressly required to do so by Congress, at the point of setting technology-based standards.

D. This Court's Precedent Recognizes No Rule Requiring EPA to Consider Costs When the Statute Does Not Require EPA to Do So.

Petitioner UARG, relying on *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), appears to urge this Court to adopt a new gloss on *Chevron* that would afford less deference to agencies in cases "where costs are clearly relevant." UARG Br. 39.

UARG advances a requirement for agencies to consider costs in rulemaking whenever they are "relevant" to regulated entities, and Congress has not expressly precluded cost considerations. *Id.* UARG specifically asserts that "costs are clearly relevant" when it comes to "regulatory decisions involving emissions standards." *Id.*

Such a new standard of review for agency rulemaking is unprecedented and particularly unwarranted here, where EPA's interpretation is true to Section 112(n)(1)(A)'s text, its statutory context, and Congress's intent as evidenced in the provision's legislative history. Under UARG's broad "cost relevance" criterion, in instances where Congress has not clearly precluded cost consideration, agency rulemaking to implement a regulatory statute that does not make cost consideration a central factor effectively would be deemed unreasonable *per se*. *See id.* Here, at the very least, that result would subvert congressional intent and raise significant separation-of-powers concerns. This Court should not be "tempted by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands." *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1873 (2013) (cautioning that "'judges ought to refrain from substituting their own interstitial lawmaking' for that of an agency" (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980))); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) (Congress understood statutory ambiguity would be resolved by the agency and "desired the

agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."); *Chevron*, 467 U.S. at 866 (Constitution vests in the political branches responsibility for resolving struggle between competing views of public interest). Petitioners fail to identify a single case – because there is none – where this Court, or any appeals court, has *required* EPA to consider costs when Congress, in the Clean Air Act, did not require EPA to do so.

II. The States' Experience Demonstrates that the Air Toxics Rule Is Achievable Using Cost-Effective, Readily Available Control Technologies.

Petitioners claim that the Air Toxics Rule "threatens to put covered electric utilities out of business," Michigan Br. 4; the costs to comply are "unprecedented," UARG Br. 21; and the burdens imposed by the Rule demonstrate that EPA's decision is "utter[ly] irrational[ ]," NMA Br. 19. Those claims are contradicted by the States' actual experience.[16] Power plants in many states are complying with standards more stringent than the Air Toxics Rule, using

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[16] Other factors, including the lower cost of natural gas and reduced demand resulting from more efficient use of energy, would have a *greater* impact on projected coal plant retirements than the Air Toxics Rule. 76 Fed. Reg. at 25,055. Indeed, EPA's estimate shows early power-plant retirements due to the Rule, as of 2015, will be "less than 2 percent of all U.S. coal-fired capacity in that year." *See* 77 Fed. Reg. at 9416; *see also id.* at 9408.

cost-effective, available control technologies, and without sacrificing electric system reliability. Indeed, it is the actual performance of power plants employing economically viable controls – such as those located in states with already established state hazardous air pollutant standards – that EPA relied on in setting the MACT floor standards in the Rule, as required by Section 112(d). Similarly, when making its threshold Section 112(n)(1)(A) listing determination, EPA found that it was "appropriate" to regulate power-plant emissions, in part, because it had identified available, effective control options. *See* 77 Fed. Reg. at 9310; 65 Fed. Reg. at 79,830.

Since 2003, at least fifteen states have promulgated limits on mercury emissions from power plants. In all but four of those states, power plants *are already* obligated under state law to control mercury emissions by April 2015, when the Air Toxics Rule takes effect, 77 Fed. Reg. at 9465, and in eight of those states power plants were obligated to do so more than five years ago.[17] Almost every state that

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[17] *See* 5 COLO. CODE REGS. § 1001-8:B.VIII.c (first phase compliance by Jan. 1. 2012); CONN. GEN. STAT. § 22a-199(b)(1) (compliance by Jul. 1, 2008); DEL. ADMIN. CODE, tit. 7, § 1146-6.1 (first phase compliance by Jan. 1, 2009); ILL. ADMIN. CODE tit. 35, § 225.230(a) (compliance by Jul. 1, 2009); MD. CODE REGS. tit. 26, § 11.27.03.D (first phase compliance by Jan. 1, 2010); 310 MASS. CODE REGS. § 7.29(5)(a)(3)(e) (first phase compliance by Jan. 1, 2008); MINN. R. 7011.0561, subp. 4 (A) (first phase compliance by Jan. 1, 2018); MONT. ADMIN. R. 17.8.771(1)(b) (compliance by Jan. 1, 2010); N.H. REV. STAT. ANN. § 125-O:11-18, I. (compliance by Jul. 1, 2013); N.J. ADMIN. CODE § 7:27-27.7(a) (compliance by

(Continued on following page)

has set an output-based mercury standard has imposed one more stringent than the Air Toxics Rule standard, and several are twice as stringent.[18] Accordingly, the National Association of Clean Air Agencies (NACAA) and several states advocated for a lower mercury limit than the Rule imposes.[19] NACAA similarly recommended a higher reduction requirement for sulfur dioxide, and New Jersey noted that

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Dec. 15, 2007); N.Y. COMP. CODES R. & REGS. tit. 6, § 246.6(c) (first phase compliance by Jan. 1, 2010); 15A N.C. ADMIN. CODE 2D.2511(b) (compliance by Dec. 31, 2017); OR. ADMIN. R. 340-228-0606(1) (compliance by Jul. 1, 2012); WIS. ADMIN. CODE NR § 446.13(1) (compliance by Apr. 16, 2016); *see also* MICH. ADMIN. CODE r. 336.2503(1)(a)-(b) (2009) (compliance by Jan. 1, 2015), *modified by* MICH. ADMIN. CODE r. 336.2502a (2013) (exempting covered power plants "for which the [Air Toxics Rule] is an applicable requirement relative to emissions of mercury" and, if the Rule ceases to be an applicable requirement, extending compliance date to the sooner of three months from the date of inapplicability or April 16, 2015).

[18] The Air Toxics Rule imposes a mercury emission standard of 1.2 lb/TBtu or 0.013 lb/GWh. *See* 77 Fed. Reg. at 9367, Table 3. Most state rate-based standards are set at 0.6 lb/TBtu or 0.008 lb/GW-hr. *See* CONN. GEN. STAT. § 22a-199(b)(1) (0.6 lb/TBtu); DEL. ADMIN. CODE, tit. 7, § 1146-6.2 (0.6 lb/TBtu); ILL. ADMIN. CODE tit. 35, § 225.230(a) (0.008 lb/GW-hr); 310 MASS. CODE REGS. § 7.29(5)(a)(3)(f) (0.0025 lb/GW-hr); MICH. ADMIN. CODE r. 336.2503(1)(b) (0.008 lb/TBtu); MINN. R. 7011.0561, subp. 4 (0.008 lb/TBtu); MONT. ADMIN. R. 17.8.771 (0.9 lb/TBtu); N.J. ADMIN. CODE § 7:27-27.7(a) (3.00 mg/MWh (equivalent to 0.66 lb/TBtu)); N.Y. COMP. CODES R. & REGS. tit. 6, § 246.6(a) (0.6 lb/TBtu); OR. ADMIN. R. 340-228-0606(1) (0.6 lb/TBtu); WIS. ADMIN. CODE NR § 446.13(1) (0.008 lb/GW-hr).

[19] Massachusetts Cmts., J.A. 216, 225; NACAA Cmts., J.A. 301-03; Comments of the New Jersey Dep't of Envtl. Prot. (New Jersey Cmts.), J.A. 327, 328; New York Cmts., J.A. 799.

the proposed alternate sulfur dioxide standard was less stringent than its own standard, which its coal-fired plants were already meeting. NACAA Cmts., J.A. 302-03; New Jersey Cmts., J.A. 326, 328.

Several states, including even Petitioner Michigan, reported in their comments on the proposed rule that coal-fired power plants within their borders could achieve the proposed mercury standard with technologies already in place. Comments of the Connecticut Dep't of Energy and Envtl. Prot. (Connecticut Cmts.), J.A. 190-91; Massachusetts Cmts., J.A. 217-18, 225; Comments of the Michigan Dep't of Envtl. Quality (Michigan Cmts.), J.A. 260-61; New Jersey Cmts., J.A. 322; NESCAUM Cmts., J.A. 246.[20] Petitioner Michigan's Department of Environmental Quality (DEQ), represented that "[w]ith the right combination of emission controls, the proposed mercury emission limit is achievable by existing Michigan [coal-fired] units," citing a number of available control technologies then being installed

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[20] Similarly, most of Florida's coal-fired power plants have already implemented controls that have "significantly reduced [those facilities'] mercury emissions" and several already meet EPA's proposed mercury limit using existing controls. Florida TMDL, *supra* note 8, at 3, 34. In North Carolina, by 2010 power plants had already reduced mercury emissions by seventy-two percent from 2002 levels through controls required to meet state-mandated sulfur dioxide and nitrogen oxide reductions. *See* N.C. Dep't of Env't and Nat. Res. and N.C. Utils. Comm'n, *Implementation of the "Clean Smokestacks Act,"* (June 1, 2013), http://daq.state.nc.us/news/leg/2013_Clean_Smokestacks_Act_Report.pdf at 13.

on Michigan power plants, including fabric filter baghouses and wet and/or dry scrubber systems, which "can be used to meet the proposed mercury emission limit." Michigan Cmts., J.A. 260-61. Michigan DEQ raised no concerns as to either the cost of mercury pollution control technology for existing power plants or effects on electric system reliability. Rather, it noted that the Michigan Public Service Commission (responsible for utility regulation), along with "a stakeholder workgroup consisting of industry, environmental groups, and government agencies" participated in the rulemaking process that led to the development of Michigan's own standard, which at that time would have required as one of three compliance options for existing coal-fired plants a "minimum of 90% reduction from baseline input mercury levels" or an output-based mercury emission standard more stringent than the Air Toxics Rule. *Id.*, J.A. 261-62; *see supra* notes 17, 18.

Power plants in Connecticut, Massachusetts, and New Jersey were complying with those states' mercury standards three to four years prior to EPA's 2011 issuance of the proposed rule, using technologies such as activated carbon injection, scrubbers, baghouses, and dry sorbent injection. *See* Connecticut Cmts., J.A. 187, 190-91; Massachusetts Cmts., J.A. 224-25; New Jersey Cmts., J.A. 327; NESCAUM Cmts., J.A. 241-46 (noting that several Connecticut and Massachusetts units have relied on existing scrubbers and

fabric filters to meet mercury limits).[21] States' successful implementation of control measures to achieve reductions in sulfur dioxide and nitrogen oxides required by EPA pursuant to other Clean Air Act programs similarly demonstrates that the Air Toxics Rule can timely be implemented without disrupting electric system reliability. NACAA Cmts., J.A. 297-98 (citing EPA's 2005 "Clean Air Interstate Rule"[22] and 1998 "NOx SIP Call"[23]). To comply with the Clean Air Interstate Rule, for example, power plants installed a substantial number of new scrubbers (a key technology to meet mercury and acid gas limits required by the Air Toxics Rule) – within four years, the time period allowed for Air Toxics Rule compliance. *Id.*, J.A. 296, 297-98.[24]

When EPA proposed the Air Toxics Rule in 2011, sixty percent of the U.S. coal fleet (based on capacity)

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[21] *See also* NACAA Cmts., J.A. 297-98 ("To our knowledge, no source has failed to comply with state deadlines for achieving [mercury] limitations, and no significant adverse impacts on electric system reliability were encountered as units were upgraded to meet state requirements.").

[22] The Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (May 12, 2005), was replaced by the Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011), upheld in *EME Homer City*, 134 S. Ct. at 1584.

[23] *See* 63 Fed. Reg. 57,356 (Oct. 27. 1998) (requiring certain states to revise their state implementation plans (SIPs) to reduce emissions of nitrogen oxides).

[24] Section 112(i)(3) allows three years for compliance plus one additional year if "necessary for the installation of the controls." 42 U.S.C. § 7412(i)(3)(A), (B).

had scrubbers – the most capital-intensive technology potentially needed for Air Toxics Rule compliance – installed or under construction, thirty-five percent had fabric filters, and seventy percent had electrostatic precipitators. Comments of Exelon Corp. (Exelon Cmts.), J.A. 644-45; *see also* NESCAUM Cmts., J.A. 246-47 (providing unit-based statistics). Activated carbon injection was already installed or reported to be on order for power plants representing approximately twenty percent of total coal-fired capacity. NESCAUM Cmts., J.A. 246-47 (noting that 62.5 GW of capacity had the technology installed or booked); Exelon Cmts., J.A. 576 (noting that the U.S. coal fleet represents 310 GW of generating capacity).[25] Without the Air Toxics Rule, however, some of these plants may not operate their installed controls at all, or to the extent necessary to reduce emissions to the level required by the Rule, because it costs money to do so, reducing earnings. Respondents Calpine Corp., *et al.*, Cert. Opp'n Br. 6-7. The Air Toxics Rule will ensure these controls are operated consistently to achieve the required reductions.

Also by 2011, nearly half of the 339 existing coal-fired units for which EPA had mercury data already met EPA's proposed mercury limit. NACAA Cmts.,

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[25] The costs of activated carbon injection, which has successfully controlled mercury emissions from municipal waste combustors, have declined significantly since 2001, when the Department of Energy began full-scale testing of this technology in coal-fired power plants. New York Cmts., J.A. 802-06.

J.A. 298. EPA estimated in 2012 that 69 of the 252 existing units for which it had data on all relevant pollutants already met all of the proposed limits in the Air Toxics Rule. 77 Fed. Reg. at 9387. By the end of 2012, sixty-four percent of U.S. coal-fired power capacity had adequate control equipment in place to comply with the Air Toxics Rule in its entirety. EIA Report, *supra* note 1. That on-the-ground reality, along with the States' experience implementing stringent state mercury standards and EPA rules requiring technological controls similar to those required by the Air Toxics Rule, demonstrates that Petitioners' claims of widespread adverse effects on industry and consumers lack a basis in fact.

III. Even if Costs Are Considered, EPA's Findings, as Set Forth in the Regulatory Impact Analysis, Overwhelmingly Support Its Appropriate and Necessary Determination.

Even if EPA were required to consider costs at the threshold listing stage, EPA's benefit cost analysis in the RIA shows the Air Toxics Rule's benefits vastly outweigh its costs and EPA could reasonably have found it appropriate to regulate. Petitioners disregard EPA's full analysis of benefits, wrongly contend the costs of the Rule outweigh its benefits, and, in UARG's case, go so far as to claim that the Rule will produce "zero" public health benefits at the expense of consumers. UARG Br. 43; Michigan Br. 32; NMA Br. 19.

To the contrary, and given that there are such "limited resources available to deal with grave environmental problems," *Entergy Corp.*, 556 U.S. at 232 (Breyer, J., concurring), the Rule, as the RIA amply demonstrates, is a bargain. Compliance will achieve sharp reductions in toxic pollution, including a seventy-five percent reduction, by 2015, in mercury emissions – while also producing substantial co-benefits, such as emissions reductions in fine particulate matter, greenhouse gases, and non-hazardous pollutants. 77 Fed. Reg. at 9424, 9428-32; RIA, J.A. 925. Effects on electricity prices will be modest. EPA's analysis shows that, even with the Air Toxics Rule in effect, electricity prices are projected to be *lower* in 2015 and 2020 than they were in 2010. *See* 77 Fed. Reg. at 9414.

Contrary to Petitioner Michigan's assertion that co-benefits from reduced fine particulate matter emissions are "not relevant" to EPA's decision to regulate, Michigan Br. 48, reducing that pollution will directly benefit public health by reducing exposure to the non-mercury metals – such as arsenic and selenium – which make up a significant portion of the fine particulate matter emitted by coal-fired power plants, *see* Pub. Health Grps. Cmts., J.A. 343, 345. Moreover, Congress has long recognized that "MACT standards would have the collateral benefit of controlling criteria pollutants as well [as hazardous air pollutants] and viewed this as an important benefit of the air

toxics program." 77 Fed. Reg. at 9406 (citing S. Rep. No. 101-228, at 172, 1990 U.S.C.C.A.N. at 3557).

As a practical matter, the RIA's extensive and well-documented benefit cost analysis establishes the cost effectiveness of the Rule. Any additional requirement to formalize that analysis as part of EPA's rulemaking would further delay implementation of long-overdue and urgently needed federal regulation of power-plant hazardous air pollution.

CONCLUSION

Petitioners' proper recourse lies with Congress, not this Court. It was Congress, not EPA, that placed public health at the heart of EPA's decision to regulate the hazardous air pollution emitted by power plants. EPA permissibly concluded that, in determining whether regulation is "appropriate and necessary," it should focus its attention on factors relating to public health hazards, and not industry's objections that emissions controls are costly, properly putting

"the horse before the cart, and not the other way around." NMA Pet. App. 29a.

The decision below should be affirmed.

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